SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC 7
CO04/2022

In the matter between

THE REPUBLIC
(rep. by Mr Powles)

and

MUKESH VALABHJI — **1st Accused**
(rep. by F Bonte)

LAURA VALABHJI — **2nd Accused**
(rep. by S Aglae)

LESLIE BENOITON — **3rd Accused**
(rep. by Mr B Hoareau)

LEOPOLD PAYET — **4th Accused**
(rep. by Mr B Hoareau)

FRANK MARIE — **5th Accused**
(rep. by J Camille)

Neutral Citation: *Republic v Valabhji & ors* [CO04/22] [2023] SCSC 7
Before: Govinden CJ
Heard:
Delivered: 13thJanuary 2022

RULING

GOVINDEN CJ

[1] The 3rd accused in this case has filed a motion dated 12th of December 2022, applying to be released on bail pending the determination by the court of the criminal charges laid against him.

[2] In his affidavit in support of the application, he makes the following material averments:

> *"4. I stand charge of the following offences:*
>
> *(i) conspiracy to possess terrorist property contrary to Section 7(b) of Prevention of Terrorism Act read with Section 20(c) of the same said Act, and punishable under Section 7(b) of the same said Act;*
>
> *(ii) conspiracy to possess firearms and ammunition contrary to Section 84(1) of the Penal Code read with section 381 of the same said Code and punishable under section 84(1) of the same said Code,*
>
> *(iii) possession of terrorist property contrary to Section 7(b) of Prevention of Terrorism Act, and punishable under section 7(b) of the same said Act; and*
>
> *(iv) possession of firearms and ammunition to Section 84(1) of the Penal Code, and punishable under the same said section of the said Code.*
>
> *5. I have been in detention since the 21st November 2021, when I was initially arrested on the suspicion of having committed offences under the Anti-Corruption Act and the Anti-Money Laundering and Countering The Financing of Terrorism, Act. Therefore, I was in remanded in custody as a suspect, on the suspicion of having committed offences under the said Acts.*
>
> *6. On 2nd December 2021, whilst still in detention, I was further arrested on the allegation of having committed offences, relating to firearms and ammunitions, and under the Prevention of Terrorism Act, 2004.*
>
> *7. Since the 3rd of December 2021 I have been remanded in custody in respect of offences relating to firearms and ammunition and of offences under the Prevention of Terrorism Act, initially as a suspect and as form 11th February 2022 as an accused person.*

8. The hearing of the case was supposed to commence on 1st December 2022 and the case was to be heard for the whole of December 2022.

9. Upon an application made by two co-accused persons to adjourn the hearing of the case in December, I objected to the said application.

10. However, the Court granted the respect for the adjournment in its ruling, granting the adjournment, the Court ruled that the co-accused persons, requesting for the adjournment, and the prosecution were responsible for the situation which rendered the adjournment necessary. Hence, the adjournment of the hearing was not due to any fault on my part. As a matter of fact, I was ready and prepared for the hearing. At this present time, no date has been fixed for the hearing of the case.

11. I have already been on remand for over one year and by the time the hearing of the case is completed there is a great likelihood that I would have been on remand for over two years.

12. I aver that the length of time that I have been remand without the trial of the case having commenced, coupled with the adjournment of the hearing of the case – through no fault of mine – consist of material change in circumstances, and on which basis I ought to be released on bail pending the determination the case.

13. I aver that if I am released on bail I am prepared to abide to any reasonable conditions to secure my attendance before this court and also to ensure that I do not obstruct the course of justice in any manner whatsoever.

14. As a matter of fact I have no intention of absconding or to obstruct the course of justice.

15 On the basis of all the above, it is in the interest of justice that I be released on bail pending the determination of the case."

[3] The Republic strenuously resist this application. In its Reply dated 27th December 2022, Learned counsel for the respondent makes the following material averments:

> *"1. On 12th December 2022 the Applicant, Leslie Benoiton, submitted an application to be released on bail pending determination by the Supreme Court of the criminal charges laid against him in CR No. 4 of 2022.*
>
> *2. The principal ground for seeking bail is that, through no fault of his, the trial, having been fixed for 1st December 2022, has now been adjourned. While there will now be some delay to the commencement of trial, given the nature and complexity of investigation that has been undertaken, and the seriousness of the charges which the Applicant faces, the overall pre-trial detention cannot yet be considered excessive or such that the Court must order release on bail.*
>
> *3. It is common ground that where an accused is in custody, there is a need for an expeditious trial. The UN Human Rights Committee has said that where defendants are denied bail, "they must be tried as expeditiously as possible": General Comment No. 32 (2007) at [35]. The UN Human Rights Committee has found violations of the right to be tried without undue delay in cases where defendants have been in pre-trial detention for just under 2 years: Brown v Jamaica (Comm No 775/1997), 11th May 1999 at [6.11], and between 2 and 3 years: Evans v Trinidad and Tobago (Comm No 908/2000), 21st March 2003 [6.2-6.3]. But the Committee has also found a claim inadmissible in a case in which only 1½ years had elapsed between arrest and trial. The Committee noted that this period of time "does not, of itself, constitute undue delay": Ratiani v Georgia (Comm No 975/2001), 21st July 2005 at [10.7]. The European Court of Human Rights has also found a violation of rights where pre-trial detention has been 2 years and 4 months in Gonta v Romania (Application No. 38494/04) and 1 year and 4 months in Ismayilov v Azerbaijan (Application No. 16794/05). However, in the latter case the charges faced were not as serious as here, they related solely to breach of revenue laws.*

4. For the reasons set out in the Affidavit of DS Davis Simeon appended to this Reply, it is respectfully submitted that bail should continue to be denied on grounds that there remain substantial grounds to believe that the Applicant will:

(i) Fail to appear for trial,

(ii) Will interfere with witnesses,

(iii) Otherwise obstruct the course of justice, or

(iv) Will commit an offence on release.

5 That there are no conditions that can be imposed by this Court to alleviate the above grounds of belief."

[4] In the accompanying affidavit in support, Detective Davis Simeon avers that the reason for the trial not commencing in December 2022 was through no fault of the Republic. He avers that the time frame for commencement of trial would still be normal in this case given the nature and complexity of this matter, which involves serious offences. He further avers that there are still substantial grounds to believe that the applicant will abscond, interfere with witnesses or commit an offence if released. The deponent thereafter cites what he considers a summary of the facts against the accused.

[5] Detective Davis Simeaon avers that the offences involved the commission of a terrorist act given the nature and quantity of weapons used. The fact that the weapons were hidden shows that they were to be used for unlawful and illegal purposes; that they were to be used in the event of a change of power or change of attitude towards the previous President. One of the missing weapon was found on a property related to the 1st accused, with a clear line of sight of the residence of the President. That documents retrieved from the premises of co-accused of the applicant consist of such items of subversive activities related to explosives; sabotage demolition and surveillance etc.

[6] The grounds put forth by the Republic for justification of their views that the applicant will fail to appear, interfere with witnesses, commit further offences or obstruct the due course of justice, are all laid out in an affidavit in support filed by the investigating officer. They

can be summarised as follows: that the applicant was a high ranking officer of the Defence Forces of Seychelles and that therefore he still has loyal support in the force to assist any operations; that his training makes him well placed to evade justice as he is familiar with the justice process and can undermine it and his experience with the coast guard equips him with knowledge to escape this jurisdiction; that there is a significant quantity of weapons at large of which both the 1st accused and the applicant know where about it is and if enlarged he would either dispose these weapons or use them to commit other offences. Finally, the representative of the Republic avers that that the applicant has substantial unexplained wealth which, if he is released, can be deployed to evade justice and commit further offences.

[7] It is to be noted that in my Ruling with respect to the vacating of the trial dates I held that in the motion the applicant had raised the defence of the fact that the vacation of the trial would affect his right to be tried within a reasonable time. I went on to hold that that this submission was too premature at that stage given that no trial date has been fixed yet and that this Court will address the issue of reasonability of the time at the appropriate time that it arises. It is evident that no trial dates have been fixed in this case. Notwithstanding this, the 3rd accused has pressed for bail. The timing of his application bail application is, of course, within his right. However the issue that it raises is would necessarily be impacted by the prior view of the court.

[8] I have carefully listen to the different legal arguments put forward by both sides with regards to the legal and constitutional provisions applicable to the facts before the court. Having done so I do not find that there is much contention between the parties as to how the law operate to solve the factual issues at hand. The applicable provisions of our Constitution are articles 18 and 19, and the provision of section 179 of the Criminal Procedure Code. I agree that by virtue of the provisions of Article 47 of the Constitution the courts are inspired by decisions of international tribunals, such as those of the European Court of Human Rights and the Human Rights Committee of the International Covenant on Civil and Political Rights. Many of their decisions have been cited by both sides in this matter. Moreover, case law of the Seychelles Court of Appeal and the Constitutional Court

are also relevant and applicable. In my analysis of the issues I have extensive references to those decisions.

[9] I note that in the affidavit in support of the respondent, reference is made to the fact that upon being asked to give a statement under caution the applicant chose to remain silent. I will draw no adverse inference on this statement in accordance with article 18 (3) of the Constitution.

[10] Bearing in mind the applicable Constitutional provisions, it is clear to me that the right of the defendant to be released pending trial from the day on which detention exceeds the time limits of a reasonable length, is the rule. Detention is the exception. The defendant has to be released once his continuing detention ceases to be reasonable. Though the continuity of criminal prosecution would not necesarilybe affected.

[11] The Court European Court of Human Rights has adopted a two-step approach when it comes to ascertaining as to whether a pre-trial detention consist of a reasonable time First, it has to be ascertained whether there are relevant and sufficient reasons to substantiate the extension of pre-trial detention. Should this be the case, it has to be assessed whether the extension of detention is effectively evaluating the characteristics of the single case (see *Murdoch,L 'article 5 de la Convention européenne des droits de l'homme, 2003, p. 81*).

[12] The first fundamental phase is directed at assessing whether there are actual grounds to justify detention. Article 5.1 of the European Convention on Human Rights authorises the arrest and detention of a person for the purposes of bringing him before the competent judicial authority on reasonable suspicion of having committed an offence. However, after a lapse of time, such reasonable suspicion of having committed an offence – even if serious – cannot by itself justify the extension of pre-trial custody for an allegedly innocent person (see *ECtHR, Stögmuller v. Austria, Application no. 1602/62, Judgement 10 November, 1969, margin no. 4; ECHR, McKay v. United Kingdom (fn. 6), margin no. 45*).

[13] The stay in prison of a defendant can only be admitted for substantial reasons set out in article 18(7) order which, notwithstanding the presumption of innocence, will prevail over the rule of the right to individual liberty. Under the European Convention of Human Rights

the authority is the case of *ECtHR, Contrada v. Italy, Application no. 27143/95, Judgement 24 August, 1998, margin no. 54*). These elements correspond to four *pericula libertatis*: danger of escape, danger of evidence tainting, danger of offence commission and danger to public order.

[14] Those four dangers have also been adopted by recommendation of the Council of Europe (2006)13, of 27 September 2006, on the use of pre-trial detention, the conditions for its application and the safeguards against its abuse. Pursuant to this recommendation, pre-trial detention can only be applied if there are substantive reasons to believe that a defendant, if released, "would either (i) abscond, or (ii) commit a serious offence, or (iii) interfere with the course of justice, or (iv) pose a serious threat to public order" (Art. 7, letter b).

[15] As submitted by counsel for the applicant according to the ECtHR even when there are relevant and sufficient reasons to justify the extension of detention, at some point in the it has to be ascertained whether the period of detention is reasonable, considering the circumstances of the case. Case law is clear that as a matter of fact, it is evident that it is not possible to translate the notion of 'reasonable length' "into a precise number of days, weeks, months or years or periods varying according to the seriousness of the offence" (see *ECtHR, Stögmuller v. Austria (fn. 14) margin no. 4. 19*).

[16] In order to evaluate the reasonableness of single proceedings, the European Cour Court applies the following criteria: (a) the complexity of the case in terms of facts and legal contexts; (b) the behaviour of the defendant; and (c) the behaviour of the competent authorities. As far as the first criterion is concerned, the Court takes into consideration the number of defendants, the need to execute letters of request abroad, and the difficulties in ascertaining given offences or the high number of witnesses to be heard. See *ECtHR, Naudov. France, Application no. 35469/06, Judgement 8 October, 2009, margin no. 46; ECtHR, Dzeilli v. Germany, Application no. 65745/01, Judgement 10 November, 2005, margin no. 76; ECtHR, Contrada v. Italy (fn. 15), margin no. 67; ECtHR, Chraidi v. Germany, Application no. 65655/01, Judgement 26 October, 2006, margin no. 43.*

[17] The conduct of the defendant is the most sensitive issue. It is quite difficult to draw a line between the exercise of a right and its abuse for dilatory purposes. This is why the Court

adopts a rather cautious approach and tends to exclude that a defendant filing appeals and applications can justify the extension of detention (see *ECtHR, Toth v. Austria, Application no. 11894/85, Judgment 12 December, 1991, margin no. 77*). The fundamental criterion is the assessment of the authorities' behaviour. It has to be ascertained whether they have effectively displayed special diligence in conducting the proceedings against a defendant. This is what the Court calls 'Labita test'. In this respect, particular importance has to be attached to the presence of 'downtimes' in the proceedings. As a matter of fact, if it is sure that the time necessary to carry out procedural activities – either investigations in the strict sense of the term or preliminary hearings – the Court tends to regard a prolonged trial against a defendant as unreasonable in the presence of 'inactivity' periods.

[18] It is especially with respect to his conduct that the applicant has pressed for bail in this case. He is saying that his conduct has been exemplary. He was ready for trial in December last year and it was somewhat the conduct of other parties in this case that has led to the abortion of the trial. A trial, which he says that through no fault of his, is to take place at an inordinately long time even from today's date, such time being unreasonable.

[19] I accept counsel for the applicant's submission that after period of time the seriousness of the offence is not the only prime consideration for detaining him in custody. In fact contrary to the position in Europe, seriousness of the offence per se is not a ground for justifying pre-trial detention in this jurisdiction as the trial judge has to take into consideration this factor together with any other grounds in article 18(7) of the Constitution and see whether pre-trial detention is justified, even at the initial stage of the pre-trial detention

[20] In this case I have already ruled as to whether the four dangers or the four *pericula libertis* exist. Vide my prior decision with regards to the remand of this accused, I am still of the view at this point in time that the four *pericula libertis* are relevant and provide substantial reasons to order the applicant's detention. Moreover, the offences charged are still very serious. Notwithstanding this, the question is what effect has the effluxion of time brought in this case with regards to the right of the applicant to be tried within a reasonable time.

[21] The question that has to be answered is therefore the secondary test. It has to be ascertained whether the period of detention is reasonable, considering the specific circumstances of the

case. For this to happen, I would have to consider the criteria that could lengthened the trial process and see whether the balance of inconvenience lies bearing in mind other cases of similar nature and the time taken for trial to take place.

[22] The first question to be answered is when do we start to compute the time. The applicant was remanded in custody on the 21st of November 2021 as a suspect under the provisions of Section 101 of the Criminal Procedure Code and he was thereafter charged and formally remanded . To this court the starting date does not give rise to any problem as it corresponds to the day on which liberty was restricted. In the case *Xavier Evans v Trinidad and Tobago Communiction no 908/2000,* the Human Rights Committee observed that the relevant dates for the purpose of determining the length of the delay in the author's case are the dates between the author's arrest and trial and not as the author claims between the date of the alleged crime and the date of trial of the time. This court intends to use the same starting date in this case. The applicant has been under pre-trial detention first as a suspect then as an accused since the 21st of November 2021. The applicant at the time of lodging this application has accordingly been over one year since he had arrested in this case.

[23] However, the applicant does not stop here in his application. The applicant makes a prediction and according to him, at the time that the trial would eventually take place it would be a period of at least two years since his detention. It is on this basis that he is grounding his application and not that the actual one year consist of an unreasonable delay.

[24] With regards of the prediction of time calculated by the applicant I find that it is too premature and hypothetical. This brings me to my previous findings on this issue when I said that at least the securing of new trial dates would have settled the date for computation as to the end period for the reasonableness of the time. Without this date we are now delving in the hypothetical and ascertaining what would be the likely trial dates. Unfortunately, this court cannot embark into such kind of hypothetical exercises when it is assessing a right and balancing interests. Many things might stand contingent to the trial dates which might be further or closer to the hypothesis made by the applicant. The court will not surmise into what a period that could consist unreasonable as from the 21st of November 2021 to a date unknown in the future.

[25] What the court can do is make a finding as to whether one year and one month since the arrest of the applicant consist of unreasonable time given that he has been charged, though it does not appear to be the total be the total argument of counsel for the applicant. The court have studied the complexity of the case in terms of facts and legal contexts; the behaviour of the defendant; the behaviour of the competent authorities; the number of defendants, the need to execute letters of request abroad, and the difficulties in ascertaining given offences or the high number of witnesses to be heard. The case is a highly complex case involving multiple witnesses and accused and possibly cross jurisdictional applications. As far as the action of the accused, he has not done anything that has adversely affected the setting of trial dates so far. On the contrary, it is actions within the case that lies beyond him that have led to the delays. Regarding the authorities' behaviour, it has to be ascertained whether they have effectively displayed special diligence in conducting the proceedings against a defendant. As far as the Republic in this case is concerned, being the prosecuting authority, it has not been guilty of any latches, there were no period of inactivity on its part, and it was ready and willing for the trial fixed in December 2022, with summons issued to its witnesses.

[26] When I analyse all these in the light of the fact that the applicant is in detention for only over one year since his arrest, together with the existence of substantive grounds that if released, the defendant would either abscond, or commit a serious offences, or interfere with the course of justice - I find that the balance is tilted in favour of the Republic.

[27] I would accordingly dismiss the application as applied for.

Signed, dated and delivered at Ile du Port on 13th day of January 2023.

Govinden CJ